Filed 9/28/09 P. v. Davis CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. SHERBY LEE DAVIS, Defendant and Appellant.	C060948 (Super. Ct. No. 084298)

Defendant Sherby Lee Davis pled no contest in front of Judge Stephen L. Mock to uttering a fictitious check and admitted serving a prior prison term. In return, defendant was "promissed [*sic*] a no state prison sentence at the outset" but agreed that a "willful[] fail[ure]" to appear "without good cause" for the probation interview or for the sentencing hearing would allow the court to sentence him without regard to the promise.

Defendant failed to appear for both the probation interview and sentencing. Thereafter, Judge W. Arvid Johnson sentenced him to four years in prison.

Defendant appeals without a certificate of probable cause. He contends his agreement to have a judge other than the one who presided over his plea preside over sentencing (see *People v. Arbuckle* (1978) 22 Cal.3d 749) was unenforceable because his attorney did not acquiesce; and the court's findings he failed to appear at the probation interview and sentencing, which allowed him to be sentenced to prison (see *People v. Cruz* (1988) 44 Cal.3d 1247), were not supported by the facts because his "failures to appear . . . were not . . . willful and without good cause."

The People contend defendant needed a certificate of probable cause to raise these issues, and in any event, they fail on the merits. We disagree a certificate was needed but agree the contentions lack merit.

DISCUSSION

I

Defendant Did Not Need A Certificate Of Probable Cause

The People contend defendant needed a certificate of probable cause because the *Arbuckle* waiver "was part of defendant's plea" and the *Cruz* waiver "was an integral part of the plea agreement." No certificate was needed.

A defendant may appeal without a certificate of probable cause from postplea matters that do not challenge the plea's validity. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1096.) Here, defendant's claims involve matters that occurred after the plea was entered and are allegations of breaches of the plea agreement. Specifically, he is claiming that after he entered

the plea, the court breached that agreement by having a judge other than the one who took the plea sentence him and by having the judge sentence him to prison based on an unsupported willful failure to appear.[1] Under these facts, no certificate was needed. (See *People v. Brown* (2007) 147 Cal.App.4th 1213, 1220 [no certificate was needed where the grounds for appeal arose from the trial court's failure to give effect to the terms of the plea].)

II

Defense Counsel Agreed To The Arbuckle Waiver

An *Arbuckle* waiver allows a defendant to be sentenced by a judge other than the one who accepted the defendant's plea of guilty or no contest. (*People v. Arbuckle*, *supra*, 22 Cal.3d at pp. 756-757.) Here, defendant claims his agreement to have a judge other than Judge Mock (who took the plea) preside over sentencing was ineffectual, because "whether to waive or assert a defendant's Arbuckle right is a decision that must be made by counsel, not by the client," and here, counsel did not waive defendant's *Arbuckle* right. We need not decide whether defendant's legal predicate (counsel's waiver of *Arbuckle* is necessary) is correct, because his factual predicate (counsel did not waive *Arbuckle*) is incorrect.

---

[1] As recounted in part II of the Discussion, *ante*, defendant's *Arbuckle* waiver took place immediately after the court accepted his no contest plea.

A

Facts Surrounding Defendant's Arbuckle Waiver

On September 4, 2008, immediately after the court accepted defendant's no contest plea, the following exchange occurred:

"THE COURT: Is your client prepared to waive time for sentencing?"

"[DEFENSE COUNSEL]: Just a moment. [¶] Yes, Your Honor.

"THE COURT: And that question is does he want to have me sentence him or would he be willing to have Judge Johnson sentence him?"

"[DEFENSE COUNSEL]: We would reserve, Your Honor. [¶] If the Court wants to set it in Department 5,[2] that's fine, and if there's an issue, because this Court already listened to some of the facts, we would deal with that.

"THE COURT: [Defendant], I'll be in trial when this matter is returned, and so I think it would be expeditious if I ask Judge Johnson to do the sentencing in this matter. [¶] Do you have any objection to that, sir?

"THE DEFENDANT: No, sir.

"THE COURT: Okay. We're going to set the sentencing six weeks from now. That would be the 16th of October at 8:30 in Department 5. [Defendant] will need to go and meet with the probation department on October 2nd at 2:00 o'clock in the afternoon.

---

2 Department 5 was Judge Johnson's courtroom.

"THE DEFENDANT: Okay.

"[THE PROSECUTOR]: Your Honor, there was an informal discussion between me and [defense counsel] this morning that if the defendant does get more than ninety days in jail, the People would not oppose splitting that up so the defendant was eligible for SWIP. [¶] I wanted to put that on the record in case something happens --

[¶] . . . [¶]

"[DEFENSE COUNSEL]: Thank you. That way if it goes to Department 5, it will be clear."

Thereafter, on October 16 and October 30, the parties came before Judge Johnson in Department 5 regarding defendant's failure to appear for a probation interview and for sentencing. Defense counsel did not claim Judge Johnson could not sentence defendant.

At a hearing on December 10 in front of a substitute judge (Judge Doris Shockley), substitute defense counsel stated defendant was "prepared to go forward with sentencing today. It's just an issue of Judge Johnson not being available." The prosecutor stated, "[t]here was an Arbuckle waiver on 9[-]4[-]08. We can sentence today." The court responded, "Well, his attorney isn't here," and the proceedings ended.

Two days later on December 12, the prosecutor, defense counsel, and defendant appeared before Judge Johnson for the sentencing hearing. Judge Johnson said defendant had "lost" his promise of no state prison and he was "clearly not suitable for probation," "[s]o the only issue is whether it's [the] upper

term or middle term" because he "c[ould]n't see low term." Defense counsel requested a hearing on aggravating and mitigating factors, so counsel could make a showing that this was an "unusual case." Judge Johnson stated he would set the hearing for December 16 to give counsel the opportunity to make that showing. He was "inclined to follow the recommendations" of the probation department at this point, but that did not mean he would ultimately do so. That recommendation was for the upper term.

On December 15, defense counsel filed a motion to have Judge Mock preside over sentencing, claiming defendant did not enter an *Arbuckle* waiver. At the hearing on the motion, Judge Mock found that defendant made a personal waiver and "the Arbuckle waiver issue[] lies with the defendant alone."

B

Counsel Agreed To The Arbuckle Waiver

On the record we have just recounted, we find defense counsel agreed to the *Arbuckle* waiver. When defendant personally waived his *Arbuckle* rights in September, defense counsel agreed to have the sentencing hearing set in Department 5, which was Judge Johnson's courtroom. Thereafter, twice in October when the parties came before Judge Johnson in Department 5 for defendant's failures to appear, counsel voiced no objection to Judge Johnson sentencing defendant. On December 10, the new date of sentencing, substitute defense counsel was prepared to go forward and stated it was just "an issue of Judge Johnson not being available." It was only later

in December, when Judge Johnson made clear he was sentencing defendant to prison and was inclined to impose the upper term, defense counsel asserted there was no *Arbuckle* waiver. On this record, defendant is wrong that counsel did not agree to a waiver of defendant's *Arbuckle* rights.

III

Substantial Evidence Supported The Court's Implied Findings That Defendant's Failures To Appear Were Willful And Without Good Cause

Defendant contends the court was "precluded" from sentencing him to prison despite his *Cruz* waiver because his "failures to appear . . . were not shown to be willful and without good cause."[3] The gist of his contention is the court failed to find defendant *willfully* and *without good cause* failed to appear for his probation interview or for sentencing and instead simply found a failure to appear and that there was no evidence that his failures were willful and without good cause.

---

[3] In *Cruz*, our Supreme Court held that a defendant's failure to appear at sentencing ordinarily does not justify the imposition of a sentence greater than that for which he bargained. However, the right to be sentenced in accordance with a plea agreement can be waived by the defendant's willful failure to appear at sentencing if the waiver is made at the time the plea is entered. (*People v. Cruz*, *supra*, 44 Cal.3d at p. 1254, fn. 5.)

Here, defendant's waiver went further than *Cruz*, as it allowed for a prison sentence not only for a willful failure to appear at "judgment and sentencing" but also for a willful failure to appear at his "probation interview."

Defendant's contention fails. As we explain, the court impliedly found defendant's failures to appear at the probation interview and for sentencing were willful and without good cause, and there was substantial evidence to support the court's findings.[4] (See *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 [reviewing court must adopt the trial court's factual findings if substantial evidence supports them].)

As to defendant's failure to appear at the probation interview on October 2, 2008, defense counsel presented the testimony of defendant's "adopted father," Everett Kelley. Defendant asked Kelley to drive him to Woodland for the probation interview on October 4, which Kelley did. Upon arrival, a lady at the probation department told defendant he should have been there two days' prior. Defendant "appear[ed] surprised."

After this testimony, defense counsel argued defendant had "misread the date on the minute order . . . ." The court rejected this argument, stating the minute order "couldn't be

---

[4] To the extent defendant's argument is that the court failed to make an on-the-record statement that defendant's failures were willful and without good cause, he forfeited this claim of error by failing to object. (See *People v. Scott* (1994) 9 Cal.4th 331, 353.)

clearer." "[T]he box checked is printed in very legible neat, (reading): 'Ordering interview at probation ten dash two dash 'oh' eight at two colon zero zero." "Whether he goes to prison is a separate issue, but as to his -- the guarantee of no state prison, that is clearly gone . . . ."

As to defendant's failure to appear at the sentencing hearing on October 16, 2008, defense counsel presented the testimony of defendant's sister, Kizzy Walker-Davis. Sometime between October 10 and October 13, defendant asked if he could borrow her car to drive to the sentencing hearing. She said she needed the car to get to work. Defendant then asked their cousin to take him. The cousin told defendant, "[i]f he could get him some gas money, he would take him."

After this testimony, the court found, "he was not here on October . . . 16th for sentencing . . . . [¶] So unless there's some testimony he was in a coma or something, in a hospital, or in custody somewhere else and unable to be here, from a technical standpoint, he's lost the guarantee . . . ."

The court's statements imply findings of willful failures to appear without good cause that are supported by substantial evidence. As to the October 2 failure to appear, the court found the minute order clearly stated the correct date of the probation interview, belying defendant's claim he misread the date. As to the October 16 failure to appear, the court's comments demonstrate defendant's sister's testimony was insufficient and defendant provided no reasonable excuse for

failing to show up for sentencing. Given this evidence and the court's statements, defendant's arguments fail.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

SCOTLAND, P. J.

NICHOLSON, J.